

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 28, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

REVA G.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 4:20-cv-05221-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 16, 18

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 16, 18. The Court, having reviewed the administrative record and the parties'
3 briefing, is fully informed. For the reasons discussed below, the Court grants
4 Plaintiff's motion, ECF No. 16, and denies Defendant's motion, ECF No. 18.

5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

7 STANDARD OF REVIEW

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner's decision will be disturbed "only if it is not supported
11 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
12 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
13 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
14 (quotation and citation omitted). Stated differently, substantial evidence equates to
15 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
16 citation omitted). In determining whether the standard has been satisfied, a
17 reviewing court must consider the entire record as a whole rather than searching
18 for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§
5 404.1502(a), 416.920(a). Further, a district court “may not reverse an ALJ’s
6 decision on account of an error that is harmless.” *Id.* An error is harmless “where
7 it is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at
8 1115 (quotation and citation omitted). The party appealing the ALJ’s decision
9 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,
10 556 U.S. 396, 409-10 (2009).

11 **FIVE-STEP EVALUATION PROCESS**

12 A claimant must satisfy two conditions to be considered “disabled” within
13 the meaning of the Social Security Act. First, the claimant must be “unable to
14 engage in any substantial gainful activity by reason of any medically determinable
15 physical or mental impairment which can be expected to result in death or which
16 has lasted or can be expected to last for a continuous period of not less than twelve
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
18 “of such severity that he is not only unable to do his previous work[,], but cannot,
19 considering his age, education, and work experience, engage in any other kind of
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is
16 not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant's age, education and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
2 concludes with a finding that the claimant is disabled and is therefore entitled to
3 benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
7 capable of performing other work; and (2) such work “exists in significant
8 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
9 700 F.3d 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 On November 16, 2017, Plaintiff applied for Title XVI supplemental
12 security income benefits alleging an amended disability onset date of November
13 16, 2017. Tr. 15, 125, 218-33. The application was denied initially, and on
14 reconsideration. Tr. 144-52, 156-62. Plaintiff appeared before an administrative
15 law judge (ALJ) on March 24, 2020. Tr. 50-89. On April 30, 2020, the ALJ
16 denied Plaintiff’s claim. Tr. 12-31.

17 At step one of the sequential evaluation process, the ALJ found Plaintiff has
18 not engaged in substantial gainful activity since November 16, 2017. Tr. 17. At
19 step two, the ALJ found that Plaintiff has the following severe impairments:
20 morbid obesity, lumbar degenerative disc disease, chronic obstructive pulmonary

1 disease, osteoarthritis, a somatic disorder, a depressive disorder, and an anxiety
2 disorder. *Id.*

3 At step three, the ALJ found Plaintiff does not have an impairment or
4 combination of impairments that meets or medically equals the severity of a listed
5 impairment. Tr. 18. The ALJ then concluded that Plaintiff has the RFC to perform
6 sedentary work with the following limitations:

7 [Plaintiff] requires a sit/stand option every 30 minutes. She is never
8 able to climb ladders, ropes, and scaffolds and rarely able to climb
9 ramps and stairs (defined as less than 15 percent of the workday). She
10 occasionally needs to use a cane for balance; is occasionally able to
11 stoop; never able to crouch, kneel, or crawl; never able to be exposed
12 to wetness or humidity, excessive vibrations, fumes, odors,
13 moving/dangerous machinery, unprotected heights, or uneven
14 surfaces. She is occasionally able to have contact with the public.

15 Tr. 20.

16 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 24. At
17 step five, the ALJ found that, considering Plaintiff's age, education, work
18 experience, RFC, and testimony from the vocational expert, there were jobs that
19 existed in significant numbers in the national economy that Plaintiff could perform,
20 such as inspector, packager; electronics worker; and sub assembler. Tr. 25.

Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
Social Security Act, from the date of the application through the date of the
decision. Tr. 26.

1 On September 18, 2020, the Appeals Council denied review of the ALJ's
2 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 her supplemental security income benefits under Title XVI of the Social Security
7 Act. Plaintiff raises the following issues for review:

- 8 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 9 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 10 3. Whether the ALJ conducted a proper step-five analysis.

11 ECF No. 16 at 6.

12 DISCUSSION

13 A. Medical Opinion Evidence

14 Plaintiff contends the ALJ erred in rejecting the opinions of Philip Barnard,
15 Ph.D., N.K. Marks, Ph.D., Phyllis Sanchez, Ph.D., Kristine Harrison, Psy.D, Gary
16 Nelson, Ph.D., and Laurie Williams, LMHC. ECF No. 16 at 9-16.

17 As an initial matter, for claims filed on or after March 27, 2017, new
18 regulations apply that change the framework for how an ALJ must evaluate
19 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*
20 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20

1 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer “give
2 any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*,
3 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §
4 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all
5 medical opinions or prior administrative medical findings from medical sources.
6 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of
7 medical opinions and prior administrative medical findings include supportability,
8 consistency, relationship with the claimant (including length of the treatment,
9 frequency of examinations, purpose of the treatment, extent of the treatment, and
10 the existence of an examination), specialization, and “other factors that tend to
11 support or contradict a medical opinion or prior administrative medical finding”
12 (including, but not limited to, “evidence showing a medical source has familiarity
13 with the other evidence in the claim or an understanding of our disability
14 program’s policies and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-
15 (5).

16 Supportability and consistency are the most important factors, and therefore
17 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
18 416.920c(b)(2). Supportability and consistency are explained in the regulations:

19 (1) *Supportability*. The more relevant the objective medical evidence
20 and supporting explanations presented by a medical source are to
support his or her medical opinion(s) or prior administrative medical

1 finding(s), the more persuasive the medical opinions or prior
2 administrative medical finding(s) will be.

3 (2) *Consistency*. The more consistent a medical opinion(s) or prior
4 administrative medical finding(s) is with the evidence from other
5 medical sources and nonmedical sources in the claim, the more
6 persuasive the medical opinion(s) or prior administrative medical
7 finding(s) will be.

8 20 C.F.R. § 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how
9 the other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when
10 two or more medical opinions or prior administrative findings “about the same
11 issue are both equally well-supported ... and consistent with the record ... but are
12 not exactly the same,” the ALJ is required to explain how “the other most
13 persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
14 § 416.920c(b)(3).

15 The parties disagree over whether Ninth Circuit case law continues to be
16 controlling in light of the amended regulations, specifically whether the “clear and
17 convincing” and “specific and legitimate” standards still apply. ECF No. 16 at 9-
18 10; ECF No. 18 at 10-12. “It remains to be seen whether the new regulations will
19 meaningfully change how the Ninth Circuit determines the adequacy of [an] ALJ’s
20 reasoning and whether the Ninth Circuit will continue to require that an ALJ
provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis
of medical opinions, or some variation of those standards.” *Gary T. v. Saul*, No.
EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29,

2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at *3 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer to the new regulations, even where they conflict with prior judicial precedent, unless the prior judicial construction ‘follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.’” *Gary T.*, 2020 WL 3510871, at *3 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d Cir. 1993) (“New regulations at variance with prior judicial precedents are upheld unless ‘they exceeded the Secretary’s authority [or] are arbitrary and capricious.’”).

There is not a consensus among the district courts as to whether the “clear and convincing” and “specific and legitimate” standards continue to apply. *See, e.g., Kathleen G. v. Comm’r of Soc. Sec.*, 2020 WL 6581012, at *3 (W.D. Wash. Nov. 10, 2020) (applying the specific and legitimate standard under the new regulations); *Timothy Mitchell B., v. Kijakazi*, 2021 WL 3568209, at *5 (C.D. Cal. Aug. 11, 2021) (stating the court defers to the new regulations); *Agans v. Saul*, 2021 WL 1388610, at *7 (E.D. Cal. Apr. 13, 2021) (concluding that the new regulations displace the treating physician rule and the new regulations control); *Madison L. v. Kijakazi*, No. 20-CV-06417-TSH, 2021 WL 3885949, at *4-6 (N.D. Cal. Aug. 31, 2021) (applying only the new regulations and not the specific and

1 legitimate nor clear and convincing standard). For the sake of consistency in this
2 District, the Court adopts the rationale and holding articulated on the issue in
3 *Emilie K. v. Saul*, No. 2:20-cv-00079-SMJ, 2021 WL 864869, *3-4 (E.D. Wash.
4 Mar. 8, 2021), *appeal docketed*, No. 21-35360 (9th Cir. May 10, 2021). In *Emilie*
5 *K.*, this Court held that the ALJ did not err in applying the new regulations over
6 Ninth Circuit precedent, because the result did not contravene the Administrative
7 Procedure Act's requirement that decisions include a statement of "findings and
8 conclusions, and the reasons or basis therefor, on all the material issues of fact,
9 law, or discretion presented on the record." *Id.* at *4 (citing 5 U.S.C. § 557(c)(A)).
10 This rationale has been adopted in other cases with this Court. *See, e.g., Jeremiah*
11 *F. v. Kijakazi*, No. 2:20-CV-00367-SAB, 2021 WL 4071863, at *5 (E.D. Wash.
12 Sept. 7, 2021). Nevertheless, it is not clear that the Court's analysis in this matter
13 would differ in any significant respect under the specific and legitimate standard
14 set forth in *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

15 *1. Dr. Barnard*

16 In September 2016, Dr. Barnard performed a psychological/psychiatric
17 evaluation and rendered an opinion of Plaintiff's level of functioning. Tr. 377-381.
18 Dr. Barnard diagnosed Plaintiff with undifferentiated somatoform disorder,
19 dysthymic disorder, and borderline intellectual functioning. Tr. 379. Dr. Barnard
20 opined she had severe limits in her ability to communicate and perform effectively

1 in a work setting and in her ability to complete a normal workday and work week
2 without interruptions from psychologically based symptoms; marked limitation in
3 her ability to understand, remember, and persist in tasks by following detailed
4 instructions; moderate limitation in her ability to understand, remember, and
5 persist in tasks by following short and simple instructions, in her ability to perform
6 activities within a schedule, maintain regular attendance, and be punctual within
7 customary tolerances without special supervision, to maintain appropriate behavior
8 in a work setting, and to set realistic goals and plan independently. Tr. 379-80. He
9 rated the overall severity of her mental health impairments as marked and opined
10 she would be so impaired with treatment for a minimum of 15 months and
11 maximum of 24 months; he recommended a representative payee and noted
12 vocational training or services may minimize or eliminate barriers to employment.
13 Tr. 380. He recommended referral to vocational rehabilitation, consultation with a
14 nutritionist, and continuation of individual counseling every other week. *Id.* The
15 ALJ found his opinion unpersuasive. Tr. 22.

16 First, the ALJ found that Dr. Barnard's opinion was not persuasive because
17 it was rendered more than a year before Plaintiff's amended alleged onset date. Tr.
18 22. The Ninth Circuit has held "[m]edical opinions that predate the alleged onset
19 of disability are of limited relevance." *Carmickle v. Comm'r of Soc. Sec.*, 533 F.3d
20 1155, 1164-65. The ALJ is required, however, to consider "all medical opinion

1 evidence.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citing 20
2 C.F.R. § 404.1527(b)). Indeed, the regulations indicate that medical opinion
3 evidence predating the claimant’s filing can be relevant. *See* 20 C.F.R. §
4 416.912(d) (stating that “[b]efore we make a determination that you are not
5 disabled, we will develop your complete medical history for at least the 12 months
6 preceding the month in which you file your application unless there is reason to
7 believe that development of an earlier period is necessary or unless you say that
8 your disability began less than 12 months before you filed your application.”).
9 Plaintiff’s original alleged onset date was 2010, but at the hearing she amended her
10 alleged onset date to coincide with the date of her current SSI application.³ Tr. 22.

11 Additionally, plaintiff points out Dr. Barnard explained the limits he assessed
12 would be in effect for a minimum of fifteen months, which is into the period
13 covered by the date of her current application. ECF No. 16 at 11, *see* Tr. 380. On
14

15 ³ Regardless of alleged onset date, the earliest month for which Plaintiff would
16 receive benefits is the month following the month she filed the current SSI
17 application (filed November 2017); payment of SSI benefits is first made the
18 month after the month initial eligibility is met. *See* 20 C.F.R. §§ 416.202g,
19 416.203, 416.330, 416.335, 416.501; SSR 83-20.
20

1 this record, rejecting Dr. Barnard’s opinion because of the date it was rendered is
2 not supported by substantial evidence.

3 Next, the ALJ found Dr. Barnard’s opinion unpersuasive because the
4 opinion was “unsupported by mental health records, which indicate substantially
5 normal findings, as discussed above.” Tr. 22. However, there is little discussion in
6 this decision of Plaintiff’s mental health impairments or mental health treatment
7 records and no analysis of mental status exam findings or testing conducted by Dr.
8 Barnard or any other provider. *See* Tr. 17-26. While the ALJ summarizes
9 Plaintiff’s *physical* health records above the paragraph where he discusses Dr.
10 Barnard’s opinion, he dedicates one sentence to her mental health in the summary,
11 noting that “mental health counseling notes from September 2017, before the
12 [Plaintiff’s] alleged onset date, include various complaints of anxiety and
13 depression”; the ALJ cites to one page of treatment notes here without analysis or
14 further explanation. Tr. 21. This is insufficient. Without the ALJ offering more
15 than his stated conclusion, the Court is unable to meaningfully review whether the
16 ALJ’s interpretation of the evidence, rather than Dr. Barnard’s opinion, is rational.
17 *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015); *Embrey v. Bowen*,
18 849 F.2d 418, 421-22 (9th Cir. 1988) (requiring the ALJ to identify the evidence
19 supporting the found conflict to permit the Court to meaningfully review the ALJ’s
20 finding); *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (“The ALJ must do

1 more than state conclusions. He must set forth his own interpretations and explain
2 why they, rather than the doctors' [opinions] are correct."").

3 Here the ALJ based his conclusions on reportedly normal mental health
4 findings but failed to support his conclusion or discuss Plaintiff's mental health
5 records at all. The one treatment record the ALJ cites concerning her mental health
6 is from a mental health intake appointment on September 28, 2017, less than two
7 months prior to her current SSI application, where notes reveal she was seeking
8 mental health treatment again due to "increased pressures in her life she was
9 attempting to manage." Tr. 592. Review of the longitudinal record reveals a long
10 history of mental health issues with diagnoses of PTSD, major depressive disorder,
11 and anxiety, and more recent records show mental health treatment including
12 medication and counseling with diagnoses of major depressive disorder, PTSD,
13 and general anxiety disorder, with psychological stressors noted by providers
14 including "chronic pain and other health problems." *See, e.g.*, Tr. 592, 599, 611,
15 614, 617, 620, 623, 626, 632, 635, 638, 641, 644. The ALJ does not support his
16 findings with any analysis of Plaintiff's mental health records, including recent
17 treatment for chronic pain and depression, and his conclusion that the medical
18 opinion evidence is inconsistent with Plaintiff's mental health treatment records is
19 therefore not supported by substantial evidence.

1 On remand, the ALJ is instructed to reconsider Dr. Barnard's opinion and
2 incorporate the limitations into the RFC or give reasons supported by substantial
3 evidence to reject the opinion.

4 *2. Dr. Marks*

5 In October 2017, Dr. Marks performed a psychological/psychiatric
6 evaluation and rendered an opinion of Plaintiff's level of functioning. Tr. 384-90.
7 Dr. Marks diagnosed her with unspecified anxiety disorder, unspecified depressive
8 disorder, unspecified somatic symptom and related disorder, borderline intellectual
9 functioning, and an unspecified personality disorder. Tr. 386-87. She opined she
10 had marked limitation in her ability to understand, remember and persist in tasks
11 by following detailed instructions, to learn new tasks, adapt to changes in a routine
12 work setting, communicate and perform effectively in a work setting, and to set
13 realistic goals and plan independently; moderate limitation in her ability to
14 understand, remember, and persist in tasks by following very short and simple
15 instructions, perform activities within a schedule, maintain regular attendance, and
16 be punctual within customary tolerances without special supervision, perform
17 routine tasks without special supervision, make simple work related decisions, be
18 aware of normal hazards and take appropriate precautions, ask simple questions or
19 request assistance, and in her ability to complete a normal workday and work week
20 without interruptions from psychologically based symptoms. Tr. 387. Dr. Marks

1 rated the overall severity of her impairments as moderate and opined with available
2 treatment she would be so impaired for 12 months, and that vocational training or
3 services may minimize or eliminate barriers to employment. Tr. 388. The ALJ
4 found Dr. Marks's opinion unpersuasive. Tr. 22.

5 First, the ALJ found that Dr. Marks failed to give an adequate explanation of
6 why [Plaintiff] had marked limitations. Tr. 22. The Social Security regulations
7 "give more weight to opinions that are explained than to those that are not."

8 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).

9 "[T]he ALJ need not accept the opinion of any physician ... if that opinion is brief,

10 conclusory and inadequately supported by clinical findings." *Bray v. Comm'r of*

11 *Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2011) (internal quotation marks

12 and brackets omitted). Here, Dr. Marks explained she reviewed three of Plaintiff's

13 prior psychological evaluations, including one she performed in 2014, and she also

14 performed her own updated clinical interview and mental status exam at the 2017

15 evaluation. See Tr. 383-90. Dr. Marks provided a summary of Plaintiff's

16 background, including 2016 testing indicating extremely poor recall of visual

17 information, along with intelligence testing suggesting "she cannot understand

18 what she hears very well ... has weak nonverbal reasoning skills." Tr. 384. Dr.

19 Marks noted her history of mental health diagnoses, and performed an updated

20 clinical interview documenting Plaintiff's continuing reports of symptoms of

1 depression, such as crying for no reason, and “many worries about her health.” Tr.
2 385. Upon mental status exam, Dr. Marks observed Plaintiff was “inarticulate and
3 had a hard time expressing herself.” Tr. 388. While she was cooperative, her
4 mood was depressed and her affect was agitated, and Dr. Marks observed she
5 “cried a lot during the interview.” Tr. 389. While Dr. Marks noted her memory
6 was generally within normal limits, she explained Plaintiff’s working memory was
7 “poor” and “she needed everything repeated multiple times.” Fund of knowledge
8 and concentration were not within normal limits, however, and Dr. Marks noted
9 Plaintiff struggled to maintain focus during the evaluation. Dr. Marks supported
10 her opinion with a summary of prior evaluations, along with updated diagnoses and
11 her findings from a clinical interview and mental status testing. Accordingly,
12 substantial evidence does not support the ALJ’s finding that Dr. Marks failed to
13 give adequate explanation of why Plaintiff had marked limitations.

14 Next, the ALJ found Dr. Marks’s opinion unpersuasive because “Dr. Marks
15 relied on the earlier opinion ... by Dr. Barnard when making his findings.”

16 Consistency is one of the most important factors an ALJ must consider when
17 determining how persuasive a medical opinion is. 20 C.F.R. § 416.920c(b)(2).

18 The more consistent an opinion is with the evidence from other sources, the more
19 persuasive the opinion is. 20 C.F.R. § 416.920c(c)(2). Here, Dr. Marks

20 documented her review of multiple records prior to her 2017 evaluation, including

1 Dr. Barnard's 2016 evaluation, another provider's 2009 psychological evaluation,
2 and an earlier psychological evaluation Dr. Marks herself performed in 2014. Tr.
3 384. As discussed *supra*, the ALJ failed to provide legally sufficient reasons for
4 rejecting Dr. Barnard's opinion, and rejection of Dr. Marks's opinion on the basis
5 she relied on Dr. Barnard's opinion is similarly not supported by substantial
6 evidence.

7 Finally, the ALJ concluded "marked limitations are not supported by
8 Plaintiff's treatment records." An ALJ may discredit physicians' opinions that are
9 unsupported by the record as a whole. *Batson v. Comm'r of Soc. Sec. Admin.*, 359
10 F.3d 1190, 1195 (9th Cir. 2004). As discussed *supra*, however, the ALJ fails to
11 provide any discussion of Plaintiff's mental health treatment records in this
12 decision. Review of the records shows Plaintiff reported increase in mental health
13 symptoms around the time of her application, she had high scores on depression
14 and anxiety screening, history of trauma, and findings upon mental status exam
15 including depressed and anxious mood, pressured speech, circumstantial thought
16 process, preoccupied and ruminative "depressive" thought content, only partial
17 insight, and impaired ability to make reasonable decisions. *See, e.g.*, Tr. 592-93,
18 596, 599, 601-604, 606, 610, 640-41. Without the ALJ offering more than his
19 stated conclusion, the Court is unable to meaningfully review whether the ALJ's
20 interpretation of the medical evidence, rather than Dr. Marks's opinion, is rational.

1 On remand, the ALJ is instructed to reconsider Dr. Marks's opinion and
2 incorporate the limitations into the RFC or give reasons supported by substantial
3 evidence to reject the opinion.

4 *3. Dr. Sanchez*

5 In October 2017, Dr. Sanchez completed a review of medical evidence,
6 including the opinions of Dr. Barnard and Dr. Marks, and completed a mental
7 severity assignment and mental functional assessment. Tr. 391-93. Dr. Sanchez
8 opined plaintiff had marked limitation in her ability to understand, remember, and
9 persist in tasks by following detailed instructions; marked limits in her ability to
10 learn new tasks, to adapt to changes in a routine work setting, communicate and
11 perform effectively in a work setting, and to set realistic goals and plan
12 independently; she had "significant (moderate)" limitations in her ability to
13 understand, remember, and persist in tasks by following very short and simple
14 instructions, perform activities within a schedule, maintain regular attendance and
15 be punctual within customary tolerances, perform routine tasks without special
16 supervision, make simple work-related decisions, be aware of normal hazards and
17 take appropriate precautions, to ask simple questions or request assistance, and to
18 complete a normal workday and workweek without interruptions from
19 psychologically based symptoms. Tr. 393. Dr. Sanchez noted Plaintiff's IQ score
20 of 76 and in a column for diagnosis of "each mental health condition that impairs

1 work function,” Dr. Sanchez listed generalized anxiety disorder, persistent
2 depressive disorder (dysthymia), somatic symptom disorder, other specified
3 personality disorder, and unspecified intellectual disorder. Tr. 394. The ALJ did
4 not address Dr. Sanchez’s opinion in the decision.

5 Defendant concedes that the ALJ erred in not discussing Dr. Sanchez’s
6 opinion, but argues the error is harmless because Dr. Sanchez relied solely on the
7 reports of other evaluators, including Dr. Barnard and Dr. Marks, which the ALJ
8 properly rejected. ECF No. 18 at 15. Given the matter is being remanded for the
9 ALJ to reevaluate other medical opinions, the ALJ is directed to consider this
10 opinion on remand.

11 *4. Dr. Harrison and Dr. Nelson*

12 In February 2018, Dr. Harrison opined Plaintiff retains the ability to
13 understand short, simple instructions that are presented clearly and precisely; she
14 retains the ability to carry out simple instructions without complex steps, and she is
15 able to make simple work related decisions that do not require complex decision
16 making; she retains the ability to have superficial contact with the general public,
17 coworkers, and supervisor[s]; she retains the ability to work in a routine
18 environment where her goals are clearly set forth to her; and the medical evidence
19 supports a capacity for simple tasks away from the public. Tr. 120-22.

1 In May 2018, Dr. Nelson opined Plaintiff was capable of remembering and
2 understanding simple, repetitive, and well learned complex instructions; she would
3 have episodic disruption of concentration, persistence and pace (CPP) due to
4 cognitive limits, but retains the capacity to carry out simple one to three step
5 instructions, maintain CPP for up to two hours continuously, maintain adequate
6 attendance, and complete a normal workday and workweek within normal
7 tolerances of a competitive workplace; she would have difficulty working with the
8 general public, but is capable of working within small groups and having
9 superficial contact with supervisors; changes in the work setting could cause her to
10 experience anxiety but she retains the ability to manage common, minimal stresses
11 in an otherwise familiar and routine work setting; she is able to adapt to simple and
12 moderate changes in the workplace, and she can carry out simple and moderate
13 goals and plans as directed by supervisors. Tr. 137-38. Dr. Nelson noted he made
14 some changes to the initial medical consultant's opinion to reflect objective
15 evidence and opined the medical evidence "supports a retained capacity for simple
16 tasks away from the public." Tr. 137. The ALJ found the opinions of Dr. Harrison
17 and Dr. Nelson unpersuasive. Tr. 22.

18 The ALJ found the opinions unpersuasive because they were inconsistent
19 with mental status exams, again without citation to or analysis of the medical
20 record. As the case is being remanded for reconsideration of Dr. Barnard, Dr.

1 Marks, and Dr. Sanchez's opinions, the ALJ is also instructed to reconsider the
2 opinions of Dr. Harrison and Dr. Nelson.

3 5. *Ms. Williams*

4 In September 2017, Ms. Williams completed a documentation request for
5 medical or disability condition and rendered an opinion of Plaintiff's level of
6 functioning. Tr. 373-76. She reported Plaintiff had specific mental issues that
7 require special accommodation or consideration and that she had diagnoses of
8 post-traumatic stress; major depressive disorder, recurrent episode with anxious
9 distress; and anxiety. *Id.* She opined Plaintiff's conditions limited her ability to
10 work, look for work, or prepare for work, and that she was limited in her ability to
11 follow directions, concentrate and focus, interact with people, complete tasks,
12 make and keep appointments, use transportation, read, write, and gather
13 information, and advocate for herself. *Id.* She indicated Plaintiff would be unable
14 to participate in work activity. Tr. 373-74. She indicated she could not determine
15 if Plaintiff's condition was permanent, but that she had a specific treatment plan
16 she would be providing and monitoring to address Plaintiff's condition that
17 "involves psych evaluations for possible medication management; therapy sessions
18 to assist in preventing deterioration." *Id.* She opined Plaintiff needed further
19 evaluation, specifically "psych evaluation to determine if medications will be
20 useful to assist in treatment." Tr. 375. The ALJ found Ms. Williams's opinion

1 unpersuasive. Tr. 22. As the case is being remanded for reconsideration of the
2 examining and reviewing psychologists' opinions, the ALJ is also instructed to
3 reconsider Ms. William's opinion.

4 Upon remand the ALJ is instructed to reassess all medical opinion evidence
5 and the longitudinal record and incorporate the limitations into the RFC or give
6 reasons supported by substantial evidence to reject the opinions.

7 **B. Plaintiff's Symptom Claims**

8 Plaintiff contends the ALJ erred by failing to rely on reasons that were clear
9 and convincing in discrediting her symptom claims. ECF No. 16 at 16-19. An
10 ALJ engages in a two-step analysis to determine whether to discount a claimant's
11 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
12 "First, the ALJ must determine whether there is objective medical evidence of an
13 underlying impairment which could reasonably be expected to produce the pain or
14 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
15 "The claimant is not required to show that [the claimant's] impairment could
16 reasonably be expected to cause the severity of the symptom [the claimant] has
17 alleged; [the claimant] need only show that it could reasonably have caused some
18 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

19 Second, "[i]f the claimant meets the first test and there is no evidence of
20 malingering, the ALJ can only reject the claimant's testimony about the severity of

1 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
2 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
3 omitted). General findings are insufficient; rather, the ALJ must identify what
4 symptom claims are being discounted and what evidence undermines these claims.
5 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas*, 278 F.3d at 958 (requiring the ALJ to
6 sufficiently explain why it discounted claimant’s symptom claims)). “The clear
7 and convincing [evidence] standard is the most demanding required in Social
8 Security cases.” *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r of Soc.*
9 *Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

10 Factors to be considered in evaluating the intensity, persistence, and limiting
11 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
12 duration, frequency, and intensity of pain or other symptoms; 3) factors that
13 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
14 side effects of any medication an individual takes or has taken to alleviate pain or
15 other symptoms; 5) treatment, other than medication, an individual receives or has
16 received for relief of pain or other symptoms; 6) any measures other than treatment
17 an individual uses or has used to relieve pain or other symptoms; and 7) any other
18 factors concerning an individual’s functional limitations and restrictions due to
19 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
20 404.1529(c). The ALJ is instructed to “consider all of the evidence in an

1 individual's record," "to determine how symptoms limit ability to perform work-
2 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

3 The ALJ found that Plaintiff's medically determinable impairments could
4 reasonably be expected to cause the alleged symptoms, but that Plaintiff's
5 statements concerning the intensity, persistence, and limiting effects of her
6 symptoms were not entirely consistent with the medical evidence and other
7 evidence in the record. Tr. 21. Having determined a remand is necessary to
8 readdress the medical source opinions, any reevaluation must necessarily entail a
9 reassessment of Plaintiff's subjective symptom claims. Thus, the Court need not
10 reach this issue and on remand the ALJ must also carefully reevaluate Plaintiff's
11 symptom claims in the context of the entire record. *See Hiler v. Astrue*, 687 F.3d
12 1208, 1212 (9th Cir. 2012) ("Because we remand the case to the ALJ for the
13 reasons stated, we decline to reach [plaintiff's] alternative ground for remand.").

14 C. Step Five Analysis

15 Plaintiff contends the ALJ erred by failing to provide limitations for all of
16 Plaintiff's impairments in the RFC and the hypothetical to the vocational expert.
17 ECF No. 16 at 19-20. As the case is being remanded for the ALJ to reconsider the
18 medical opinion evidence, the ALJ is also instructed to perform the five-step
19 analysis anew, including reconsidering the step-five analysis.
20

D. Remedy

Plaintiff urges this Court to remand for an immediate award of benefits. ECF No. 16 at 20. “The decision whether to remand a case for additional evidence, or simply to award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)). When the Court reverses an ALJ’s decision for error, the Court “ordinarily must remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security cases, the Ninth Circuit has “stated or implied that it would be an abuse of discretion for a district court not to remand for an award of benefits” when three conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the credit-as-true rule, where (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand, the Court will remand for an award of benefits.

1 *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). Even where the three
2 prongs have been satisfied, the Court will not remand for immediate payment of
3 benefits if “the record as a whole creates serious doubt that a claimant is, in fact,
4 disabled.” *Garrison*, 759 F.3d at 1021.

5 Here, the Court finds further proceedings are necessary to resolve conflicts
6 in the record, including conflicting medical opinions. As such, the case is
7 remanded for further proceedings consistent with this Order.

8 CONCLUSION

9 Having reviewed the record and the ALJ’s findings, the Court concludes the
10 ALJ’s decision is not supported by substantial evidence and not free of harmful
11 legal error. Accordingly, **IT IS HEREBY ORDERED:**

12 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
13 Defendant and update the docket sheet.

14 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is **GRANTED**.

15 3. Defendant’s Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.

16 4. The Clerk’s Office shall enter **JUDGMENT** in favor of Plaintiff
17 REVERSING and REMANDING the matter to the Commissioner of Social
18 Security for further proceedings consistent with this recommendation pursuant to
19 sentence four of 42 U.S.C. § 405(g).
20

1 The District Court Executive is directed to file this Order, provide copies to
2 counsel, and **CLOSE THE FILE.**

3 DATED December 28, 2021.

4 *s/Mary K. Dimke*
5 MARY K. DIMKE
6 UNITED STATES DISTRICT JUDGE
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